

84-57

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JUL 11 1984

ALEXANDER L STEVAS,
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD J. DEGREGORIO,
Petitioner,

vs.

A. VERNON WEAVER, Administrator,
Small Business Administration,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

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SAP8



QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence that selection process for promotion was conducted in an environment of pervasive hostility toward persons of Italian ancestry and with substantial irregularities which resulted in the nonselection of persons of Italian ancestry was credible evidence of disparate impact upon persons of Italian ancestry under Title VII of the Civil Rights Act of 1964, as amended, (1972), 42 U.S.C. §2000e, et seq?

2. Whether evidence of increased hostility, racial epithets, and termination of employment, shortly after filing of complaint of discrimination under Title VII of the Civil Rights Act of 1964, as amended, (1972), 42 U.S.C. § 2000e, et seq., gives credible evidence of retaliation prohibited by Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended?

3. Whether a federal employee may be assessed costs when losing a Title VII suit, in the absence of a finding that such suit was frivolously pursued or without merit?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption
of the case in the United States Su-
preme Court.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.	i
PARTIES TO THE PROCEEDING BELOW.	iii
TABLE OF CONTENTS.	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE.	4
REASONS FOR GRANTING	8
CONCLUSION	20
VERIFICATION	24
APPENDIX	26

TABLE OF AUTHORITIES

	<u>Page</u>
Christiansburg Garment Co., v. E.E.O.C., 98 S. Ct. 694 (1978)	17, 18, 22, 23
Connecticut v. Teal, 102 S. Ct. 1271 (1982)	9, 10, 13, 14, 21
Dothard v. Rawlinson, 433 U. S. 329 (1977)	9, 13, 14, 21
Jaspers v. Alexander, 15 F.E. P. Cases 1234 (D.C. D.C. 1977) . .	18, 20, 22
Moore v. Hughes Helicopter, Inc., 708 F.2d 475 (9th Cir. 1983) . .	19
 Statutes:	
28 U.S.C., Rule 54 (d)	3, 4, 19
28 U.S.C. 1254(1)	2
42 U.S.C. § 2000e, <u>et seq</u>	2, 3, 6, 21, 22

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

RICHARD J. DEGREGORIO,

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vs.

A. VERNON WEAVER,
Administrator, Small
Business Administration,

Respondent.

PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, RICHARD J. DEGREGORIO, respectfully seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in

this case, entered on April 13, 1984.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals was not reported. Said memorandum is reproduced in Appendix A, infra, A-1 through A-6 of this Petition. The Findings of Fact, Conclusions of Law and Judgment of the district court was also not reported and is reproduced in Appendix B, infra, B-1 through B-17 of this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, A-1 through A-6) was entered on April 13, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

This case involves Sections 703(a) and 717 of the Civil Rights Act of 1964, as

amended, 42 U.S.C. § 2000e, et seq., and
Federal Rules of Civil Procedure, Rule 54(d),
28 U.S.C.

Section 703(a)(1)(2) provides as follows:

"Sec. 703. (a) It shall be
an unlawful employment practice for
an employer --

"(1) to fail or refuse to hire
or to discharge any individual, or
otherwise to discriminate against
any individual with respect to his
compensation, terms, conditions, or
privileges of employment, because of
such individual's race, color,
religion, sex, or national origin; or

"(2) to limit, segregate, or
classify his employees or applicants
for employment in any way which
would deprive or tend to deprive
any individual of employment op-
portunities or otherwise adversely
affect his status as an employee,
because of such individual's race,
color, religion, sex, or national
origin." (As amended)

Section 704(a) provides as follows:

"Sec. 704. (a) It shall be un-
lawful employment practice for an
employer to discriminate against
any of his employees or applicants
for employment, for an employment
agency or joint labor-management

committee controlling apprenticeship or other training or retraining including on-the-job training programs, to discriminate against any individual, or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title." (As amended)

Federal Rules of Civil Procedure,
Rule 54(d) provides as follows:

"(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

STATEMENT OF CASE

This case involves a suit brought under Title VII by Richard J. DeGregorio,

(hereafter "petitioner") to redress alleged discrimination against him on account of his national origin (Italian) occurring during the course of his employment by the Small Business Administration as a Business Management Specialist in the Management Assistance Division of its Boise, Idaho District Office. A supplemental complaint was filed subsequent to the termination of petitioner's said employment.

Suit was brought by petitioner, Richard J. DeGregorio, on April 11, 1980, against the Administrator of the Small Business Administration in the United States District Court for the District of Idaho, alleging inter alia, that he was denied promotion to the position of Business Management Officer in the Boise, Idaho District Office of the Small Business Administration (SBA) on account of his national origin (Italian) and in retaliation against him for his

protests of prohibited racially discriminatory employment practices and programs of the SBA Boise District Office in violation of Section 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, (1972), 42 U.S.C. § 2000e, et seq.

Shortly thereafter, SBA initiated an "investigation" of nonexistent violations of the Privacy Act by DeGregorio, and thereafter terminated his employment from the SBA Boise District Office effective on or about July 3, 1980. As a result thereof, petitioner ultimately filed a supplemental complaint in the district court alleging that respondent, SBA, had terminated his employment without cause or provocation, and all on account of his national origin and in retaliation against him for his lawful protests of SBA's alleged prohibited discriminatory employment practices against

him in violation of Section 704(a) of Title VII. On October 21, 1982, an order of the district court was entered denying respondent's motion for summary judgment. On November 18, 1982, a court trial, Honorable Harold L. Ryan, presiding was completed and thereafter, on November 23, 1982, Findings of Fact and Conclusions of Law and Judgment were entered in favor of respondent, SBA.

Over objection thereto and in denying his motion to retax costs, the court allowed costs in the amount of \$4,031.04.

On January 19, 1983, petitioner duly filed notice of appeal for said final judgment and allowance of costs to the United States Court of Appeals for the Ninth Circuit.

Petitioner appealed, among other things, the district court's judgment that petitioner (1) failed to provide any credible evidence

which raised any inference that the selection process used by respondent in filling the position of Business Management Officer had a disparate impact upon persons of Italian ancestry and (2) presented no credible evidence that he was terminated from employment in retaliation for his complaint of unlawful discrimination or because of unlawful discrimination against him because of his national origin. Petitioner also appealed the judgment of the district court allowing costs in the amount of \$4,031.04.

On April 13, 1984, the United States Court of Appeals for the Ninth Circuit filed a memorandum decision affirming the judgment of the district court. Appendix A-1 through A-5.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with the decisions of this Court on important issues

affecting the standards of proof in Title VII cases and decides an important question of federal law affecting federal employees which has not been, but should be settled by this Court.

A. THE DECISION BELOW, AFFIRMING THE DISTRICT COURT'S FINDING THAT PETITIONER FAILED TO PROVIDE ANY CREDIBLE EVIDENCE OF DISPARATE IMPACT AGAINST PERSONS OF ITALIAN ANCESTRY CONFLICTS WITH THE DECISIONS OF THIS COURT IN DOTHARD VS. RAWLINSON, 433 U.S. 321, 329 (1977) AND CONNECTICUT VS. TEAL, 102 S. CT. 1271 (1982).

Dothard vs. Rawlinson, 433 U.S. 329 (1977), authorizes a disparate impact claim challenging a practice neutral on its face, but having a more adverse impact on a protected class than others. While the plaintiff has the initial burden of proving that the selection system results in a "significantly discriminatory impact, Connecticut vs. Teal, 102 S. Ct. 1271 (1982), the burden then shifts to the employer to prove that no disparity exists, Dothard,

433 U.S. 338-39, or that the practice is necessary to the efficient operation of the business as mentioned in Connecticut vs. Teal, supra. The plaintiff need not prove discriminatory intent, however, to succeed under a disparate impact theory.

Petitioner presented considerable evidence that pervasive hostility against persons of Italian ancestry in the Seattle, Washington four state region of SBA, which included the Boise, Idaho District Office existed. More particular evidence was presented concerning hostility against Italians in the Boise District Office. Evidence showed that petitioner was the only person of Italian ancestry employed in the entire four state region, and that the Boise District Director who employed petitioner informed petitioner that he was hired upon the mistaken belief that

petitioner was a "Mexican". The evidence in the record showed that throughout petitioner's almost five years of employment, he was constantly subjected to racial slurs and jibes throughout his work day. Petitioner's equal employment opportunity and affirmative action expert testified extensively concerning the direct correlation between a constant anti-ethnic minority environment resulting in disrespect and lack of advancement for ethnic minorities on the job. The record also shows that virtually every guideline, regulation and procedure to be applied to the selection process was disregarded. The Chairperson of the two person selection committee had temporarily appointed the ultimately successful candidate to the subject position, while she was acting as District Director

in the Boise District Office. The very same candidate, who was ultimately selected, was also allowed by the selection committee and the Boise District Office to prepare and present a written evaluation to the selection committee for its consideration.

Petitioner's personnel management expert testified that the selection process was patently improper and that any objective evaluation of the relative qualifications of petitioner and the successful candidate would rate petitioner much higher. The testimony of said expert reflects that the successful candidate was not even minimally qualified for said position. The record does show clearly and convincingly that petitioner was the most outstanding of all candidates, but respondent failed to even place him on the final selection list of

best qualified candidates. Finally, it is noted that the same SBA official who assigned the successful candidate to evaluate petitioner's qualifications was the very same official who selected the successful candidate and who also informed petitioner to "look for another job."

Thusly, the district court excluded from evidence a report prepared by respondent admitting that a "prejudiced" condition existed in the Boise District Office.

Thusly, petitioner has gone far beyond the standards of Dothard vs. Rawlinson, 433 U.S. 321 (1977) and Connecticut vs. Teal, 102 S. Ct. 1271 (1982), requiring a showing of "significant discriminatory impact" upon persons of Italian ancestry and has provided overwhelming evidence in support of a finding

of disparate impact against Italians. Respondent did not and could not show that no disparity existed. Nor did it or could it show that the selection process was necessary to the efficient operation of its business.

The decision of the Court of Appeals affirming the district court's finding that no credible evidence was presented to create an inference of disparate impact therefore directly conflicts with the standards set in Dothard vs. Rawlinson, supra, and Connecticut vs. Teal, supra.

B. THE DECISION BELOW AFFIRMING THE JUDGMENT OF THE DISTRICT COURT FINDING THAT PETITIONER FAILED TO PRESENT ANY CREDIBLE EVIDENCE THAT HE WAS TERMINATED FROM EMPLOYMENT IN RETALIATION FOR HIS COMPLAINT OF UNLAWFUL DISCRIMINATION CONFLICTS WITH THE REQUIREMENTS OF SECTION 704(a) OF TITLE VII.

Section 704(a) of Title VII prohibits an employer from discriminating against an

employee because he has opposed any practice made an unlawful employment practice by Title VII or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under Title VII.

The record shows that after petitioner filed an administrative complaint of discrimination in April, 1979, alleging denial of promotion on account of his national origin, (Italian) hostility by SBA's District Director and fellow employees and racial slurs against him increased. His responsibilities were decreased. Fellow employees were encouraged to "spy" on him and personnel friendly to him in the Boise District Office became subjected to harassment. The evidence showed that after such administrative

complaint was filed, petitioner remained under close scrutiny and criticism until the final termination of his employment effective July 3, 1980. Upon petitioner's filing of his within civil complaint in the district court, SBA officials began an "investigation" of petitioner on an alleged violation of the Privacy Act. The evidence showed that no such alleged violation of the privacy act ever existed, nor did SBA officials feel that such violation existed. Shortly thereafter, petitioner was notified that he would be terminated from employment for failure to "answer questions" in connection with the "investigation". Petitioner was finally terminated from employment effective on or about July 3, 1980.

Notwithstanding, the district court found that petitioner presented no credible

evidence that petitioner had been terminated from employment in retaliation for his filing of a complaint of unlawful discrimination. Such evidence is persuasive and presents a classic case of retaliation.

Accordingly, it seems that this Court should set appropriate standards for the district court's application of Section 704(a) of Title VII.

C. THE DECISION BELOW AFFIRMING THE ALLOWANCE OF COSTS BY THE DISTRICT COURT AGAINST PETITIONER IN FAVOR OF THE SMALL BUSINESS ADMINISTRATION IS CONTRARY TO FEDERAL POLICY AND TENDS TO CONFLICT WITH THE POLICY AND REASONING EXPRESSED BY THIS COURT IN CHRISTIANSBURG GARMENT CO., VS. E.E.O.C., 98 S. CT. 694 (1978) CONCERNING ATTORNEYS FEES.

The federal courts have established a policy, particularly as to federal employees suing under Title VII, designed to protect them from punitive costs for pursuing legitimate claims of

discrimination in good faith. That policy appears to be consistent with that established in regards to attorney's fees by the Supreme Court in Christiansburg Garment Co., vs. E.E.O.C., 98 S. Ct. 694 (1978). That policy was articulated as early as 1977 in Jaspers vs. Alexander, 15 F.E.P. Cases, 1234 (D.C. D.C. 1977). In that matter where a female federal employee failed to prevail, the court held that she was ineligible for promotion at that time and it was highly unlikely, even had she been considered, that she would have been selected for the position in question, that:

"Costs will not be taxed against a U.S. government employee who brought an unsuccessful Title VII action against an agency where she did not act in bad faith in presenting an arguable claim; her income is only approximately \$12,000 per year, and public interest weighs heavily in favor of pursuit of

Title VII claims to end discrimination in government employment."

The Clerk of the District Court assessed costs against petitioner in the amount of \$4,031.04. The district court affirmed that assessment by denying petitioner's motion to retax costs. The Court of Appeals affirmed the district court's allowance of costs, citing Fed. R. Civ. P., Rule 54(d) and its decision in Moore vs. Hughes Helicopter, Inc., 708 F.2d 475 (9th Cir. 1983), holding that the district court did not abuse its discretion in awarding those costs to the Small Business Administration.

Petitioner has pursued this action diligently and in good faith and shortly before trial successfully opposed respondent's motion for summary judgment. The taxation of costs against petitioner

here is punitive and unnecessary. It is destructive of Congressional intent that legitimate claims of discrimination in federal employment should be pursued. An allowance of costs under these circumstances would have the obvious "chilling" effect of bringing litigation of this nature to an end. Jaspers vs. Alexander, 15 F.E.P. Cases, 1234 (D.C. D.C. 1977), states the proper approach that should be taken under the circumstances of this case. There has been no showing that this suit has been frivolously pursued or without merit. The district court, therefore, erred and abused its discretion in assessing such costs against petitioner.

CONCLUSION

A. Disparate impact.

The initial issue raised was whether evidence that a selection pro-

motion was conducted in an environment of pervasive hostility toward persons of Italian ancestry and subjected to substantial irregularities which resulted in nonselection of persons of Italian ancestry was credible evidence of disparate impact against persons of Italian ancestry under § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, (1972), 42 U.S.C. § 2000e-2(a).

It has been clearly illustrated here that such evidence shows a significant discriminatory impact against persons of Italian ancestry and that under Dothard vs. Rawlinson, 433 U.S. 321, and Connecticut vs. Teal, 102 S. Ct. 1271 (1982), such must be considered as credible evidence of disparate impact against persons of Italian ancestry.

B. Retaliation

The evidence in the record presents a classic case of retaliation which §704(a) of Title VII of the Civil Rights Act of 1964, as amended, (1972), 42 U.S.C. §2000e-3(a) specifically prohibits. Clarification by this Court of the scope of § 704(a) seems necessary and appropriate.

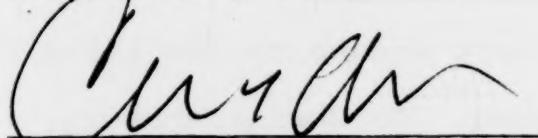
C. Costs assessed against a federal employee litigant who does not prevail on Title VII claims.

The within discussion points out the established federal policy in this regard. Jaspers v. Alexander, 15 F.E.P. Cases, 1234 (D.C. D.C. 1977), a district court case discussed herein, articulates that policy and in Christiansburg Garment Co., vs. E.E.O.C., 98 S. Ct. 694 (1978), this Court speaks to the issue of attorney's fees. In Christiansburg, it rightly con-

cludes that the losing Title VII plaintiff should not be assessed attorney's fees unless the action has been pursued frivolously or in bad faith. Petitioner has demonstrated a pursuit of this meritorious matter in good faith and under these circumstances, should not be penalized as a matter of federal policy and Congressional intent. It would seem that a failure to extend the reasoning and policy set out in Christiansburg, supra, involving attorney's fees to cases involving costs would ultimately defeat the very purpose of Christiansburg.

For the reasons set out herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



CURTIS G. OLER
Attorney for Petitioner

VERIFICATION

I, CURTIS G. OLER, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of the State of California, and I have my professional offices at One Haight Street at Market, Post Office Box 15083, San Francisco, California 94115.

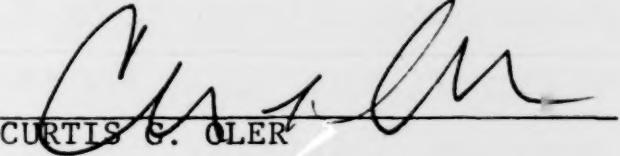
I am the attorney of record for Petitioner in the above-entitled matter.

Said Petitioner is absent from the county in which I have my office and for that reason I am making this verification on his behalf.

I have read the foregoing petition and know the contents thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury
under the laws of the State of California
that the foregoing is true and correct.
Executed on July 8, 1984, at San
Francisco, California.


CURTIS G. OLER

APPENDIX

Appendix "A" - Memorandum decision of
the United States Court
of Appeals for the Ninth
Circuit, non-published
No. 83-3584, Filed
April 13, 1984

Appendix "B" - Findings of Fact, Con-
clusions of Law and
Judgment of the United
States District Court
for the District of
Idaho, Filed
November 23, 1982

APPENDIX "A" APR 13 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT
OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD J. DEGREGORIO,)	NO. 83-3584
)	
Plaintiff-Appellant,)	D.C. # CV80-1102
)	
vs.)	MEMORANDUM*
)	
A. VERNON WEAVER,)	
Administrator, Small)	
Business Administra-)	
tion,)	
)	
Defendant-Appellee.)	

Appeal from the United States
District Court for the District of Idaho
Harold L. Ryan, District Judge, Presiding
Submitted January 6, 1984

Before: WRIGHT, TANG and ALARCON, Circuit
Judges.

Richard J. DeGregorio was denied pro-

*The panel has concluded that the
issues presented by this appeal do not
meet the standards set for Rule 21 of the
rules of this court for disposition by

motion in the Boise, Idaho District Office of the Small Business Administration in February, 1979. He asserts he was not promoted because of his national origin (Italian) in violation of 42 U.S.C. § 2000e-3(a) (Title VII). On July 3, 1980, Mr. DeGregorio was fired for insubordination in failing to comply with an agency investigation in an unrelated matter after being three times directed to answer questions.

He brought this action on April 11, 1980, after his EEOC claim was denied. After a full trial before the United States District Court for the District of Idaho, the district court filed Findings of Fact

written opinion. Accordingly, it is ordered that disposition be my memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

and Conclusions of Law and rendered judgment, finally disposing of all Mr. DeGregorio's claims, in favor of the Small Business Administration as a prevailing party.

This appeal raises the following issues:

- (1) Whether the district court clearly erred in finding that DeGregorio failed to establish a prima facie case of discrimination based on national origin;
- (2) Whether the district court abused its discretion in excluding from evidence plaintiff's proposed Exhibit 63;
- (3) Whether the district court clearly erred in finding DeGregorio's employment was properly terminated by the Small Business Administration;
- (4) Whether the district court's allowance of costs to the Small Business

Administration constituted an abuse of discretion.

Prima Facie Case

We need not determine whether DeGregorio established a prima facie case. This matter was fully tried on the merits. Under such circumstances, whether DeGregorio made out a prima facie case is no longer relevant. United States Postal Service v. Aikens, ___ U.S. ___, 103 S. Ct. 1478, 1482 (1983); Wall v. National RR Passenger Corp., 718 F.2d 906, 908-909 (9th Cir. 1983).

Refusal to Admit Plaintiff's Exhibit #63

The district court refused to admit a report submitted by Mr. DeGregorio because it was hearsay. The decision was based on several factors. It was unclear who authored the report, whether the document was a complete and correct copy, and

what, if any, was the factual basis for the conclusory statements in the exhibit. Finally, the report dealt with purportedly discriminatory loan policies with respect to businesses that apply for loans and thus was of questionable relevance. The trial court did not abuse its discretion in excluding the report.

Retaliatory Firing

The district court found that plaintiff presented no credible evidence to support his claim of termination in retaliation for his complaints of unlawful discrimination or because of unlawful discrimination against him because of his national origin. Instead the court found Mr. DeGregorio had violated a direct order from his superior in failing to respond to lawful questions in an agency investigation. This refusal, in direct contravention of the Small Bus-

iness Administration's rules and regulations, was the reason for Mr. DeGregorio's termination.

Allowance of costs to the Small Business Administration

Costs in Title VII cases, as in other types of civil cases, are allowed as of course to the prevailing party unless the court otherwise directs. Fed. R. Civ. P. Rule 54(d). The district court awarded \$4,031.04 in costs to the Small Business Administration for witness fees. These government witnesses testified primarily at Mr. DeGregorio's request. The district court thus did not abuse its discretion in awarding those costs to the Small Business Administration. Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).

AFFIRMED.

B-1

U.S. DISTRICT COURT
APPENDIX B
DISTRICT OF IDAHO
Filed at _____ m
NOV 23 1982
JERRY L. CLAPP, Clerk
By: _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD J. DEGREGORIO,) CIVIL NO. 80-1102
Plaintiff,)
vs.)
A. VERNON WEAVER, Ad-) FINDINGS OF
ministrator, Small Bus-) FACT, CON-
iness Administration,) CLUSIONS OF LAW
Defendant.) AND JUDGMENT

This case was tried to the court commencing November 16 through November 18, 1982. The plaintiff appeared in person and by and through his attorney of record, and the defendant was represented by the United States Attorney. Both plaintiff and defendant presented their cases in full by oral and documentary evidence and the matter was submitted to the court.

After full and complete consideration of all of the evidence submitted by both parties, the court sitting as trier of fact makes the following findings of fact:

FINDINGS OF FACT

1. That the plaintiff, Richard J. DeGregorio, is of Italian ancestry.
2. That the plaintiff was employed by the Small Business Administration (SBA) as a Business Management Specialist from October 13, 1975, until July 3, 1980, during which time he progressed up the career ladder to a rank of GS-12. To progress further to a GS-13 under the system, it would be necessary and was necessary for the plaintiff to seek a GS-13 position through open competitive bidding.
3. In October of 1978, the position of Business Management Officer, GS-1101-13(ADD-MA), was left vacant in the Boise

office of the Small Business Administration as the result of the retirement of the previous Business Management Officer.

4. That the foregoing position for Business Management Officer was advertised nationwide in a job opportunity announcement, No. 10-78-63, which opened the position for applicants on January 8, 1979, and closed January 19, 1979.

5. Twenty-four applicants nationwide applied for the position, 21 of whom met the initial qualifications for the position.

6. In late January of 1979, a promotion or merit selection panel was appointed pursuant to the agency's regulations.

7. The promotion panel was chaired by Mae Miyake, as a technical advisor. She was a representative of the Regional Personnel Office in Seattle, Washington. The panel was composed of Edward J. Sandstrom,

Assistant Regional Director for Procurement Assistance and Acting Assistant Regional Director for Management Assistance, and Mrs. Marie C. Wolfe, Assistant Regional Director for Administration. Sitting with the panel were two observers from the Office of Equal Employment Opportunity and Compliance (EEO), Dulcie Elvidge and Virginia Nelson. Each of the EEO observers were qualified EEO personnel to fill the function of EEO observers.

8. The selection panel met for two days and reviewed the qualifications of each applicant and prepared ratings of each applicant pursuant to agency regulations.

9. The selection panel did not compare one application with another, but approached the task under standard operating procedures by objective and subjective standards evaluating each applicant on that

particular applicant's merits, using a scoring system which ultimately was added up mathematically for each particular applicant.

10. After the evaluation of each applicant was completed by the panel, the technical advisor, Mae Miyake, mathematically added up each of the applicant's scores and based on the ratings of each applicant a list was prepared of the top seven candidates in alphabetical order. The list was referred to as the "Best Qualified List" or the "Roster of Eligibles."

11. The Best Qualified List was certified and sent to the designated selecting official, being the District Director of the Boise Small Business Administration Office.

12. The selecting official was Verne Leighton, District Director of the Boise Small Business Administration Office. Mr.

Leighton was not a member of the promotion panel nor did he have anything to do with the selecting of the members of the panel or with any of their proceedings.

13. The plaintiff, Richard DeGregorio, did not attain a rating score sufficient to place him on the Best Qualified List or the Roster of Eligibles, and therefore, his name was in fact not submitted to Verne Leighton, District Director of the Boise Small Business Administration Office.

14. The District Director of the Boise Small Business Administration Office, from the list of seven on the Best Qualified List, then selected Mr. Lawrence Henderson, who incidentally was the applicant who had received the highest rating from the selection panel, from the Best Qualified List. The actual ratings received by the applicants on the Best Qualified List were

not divulged to the selecting official.

15. Lawrence Henderson accepted the selection by the District Director of the Boise Small Business Administration Office and was thereupon promoted to serve as the Business Management Officer GS-13.

16. That Lawrence Henderson, who received the promotion to the position of Business Management Officer, GS-1101-13 (ADD-MA), was exceptionally well qualified for the position, and under the ratings of all of the applicants, in fact, received the highest score.

17. The selection process to fill the position was conducted fully in accordance with the law and all Standard Operating Procedure regulations. The panel consisted of qualified and disinterested persons, and the court could find no evidence whatsoever or even an inference of any

minority insensitivity or any bias or prejudice or discrimination as to any applicant by reason of national origin. (An admitted oversight of the panel was the omission of three points due Mr. DeGregorio for a quality step award he had received. With this additional three points the plaintiff's rating score did not qualify him in the Best Qualified Group.)

18. That Marie Wolfe in the fall of 1978, while Acting District Director for the Boise office, made the temporary appointment of Lawrence Henderson to the position of Acting Business Management Officer, which temporary appointment was later extended by Robert Wiebe while he was Acting District Director of the Boise office. The testimony was unrefuted that it was perfectly proper for Marie C. Wolfe to act as a panel member on the panel which sat

in January of 1979 to consider the 21 applicants.

19. That the temporary appointment or temporary duty of Lawrence Henderson did not add to or distract from his rating qualifications before the panel (testimony of John Talerico).

20. The Boise District Office of the Small Business Administration received complaints in late March of 1980 from individuals who contacted the Small Business Administration Office in Boise for program assistance who complained that their names and addresses had been provided without their authorization contra to the Privacy Act, to a private group called the Idaho Citizens for Minority Affairs.

21. As required by regulations, the District Director of the Boise office of the SBA advised the Office of the Inspector

General, Security and Investigations Division, and requested an investigation to determine whether or not someone in the Boise office may have violated the Privacy Act.

22. The Inspector General, Security and Investigations Division, sent a Mr. Terry Crisp, an investigator from the Washington, D.C. office to Boise to investigate the complaints.

23. Investigator Crisp developed a plan of investigation, came to the Boise office, and carried out his plan of investigation, which included interviewing several people. Investigator Crisp attempted to interview the plaintiff, Richard DeGregorio.

24. The plaintiff, Richard DeGregorio, refused to answer the investigator's questions.

25. Richard DeGregorio's duly authorized supervisor was Mr. Verne Leighton, the District Director.

26. Mr. Verne Leighton, the District Director, in his official capacity and in writing, instructed the plaintiff, Richard DeGregorio, three different times to respond to the investigator's questions and advised him of the consequences (see Exhibit 202). The only response by the plaintiff to Mr. Leighton was by letter dated May 29, 1980, wherein he states, "In reply to your memos dated May 15th, May 27th, and May 28th, 1980, I am not required to respond to unlawful inquiries, nor can you subject me to disciplinary action because of my refusal to respond to unlawful inquiries." (see Exhibit 201)

27. A letter and notice, and in general, a proposal to remove the plaintiff

from his position of Business Management Specialist, GS-1102-12, Step 5, in the Boise District Office, was given in writing to the plaintiff, receipt of which was acknowledged by the plaintiff on May 29, 1980.

28. On June 26, 1980, the Regional Administrator of the SBA, Larry C. Gourlie, from Seattle, Washington, who had lawful authority to do so, terminated the employment of Richard DeGregorio for failure to comply with Agency SOP 37-35, Item No. 15, and Section 105.516 of the Standards of Conduct Regulations (13 C.F.R. 105.516), and insubordination and failure to carry out an assigned order of his duly authorized supervisor.

29. The plaintiff, Richard DeGregorio, was offered an opportunity to respond to the charges, to review the

material used by the Regional Administrator Larry C. Gourlie in arriving at his decision and of his rights to appeal.

30. The plaintiff, Richard DeGregorio, did not respond further, and pursuant to the Gourlie letter of June 26, 1980, on July 3, 1980, Mr. Richard DeGregorio was discharged from his position with the Small Business Administration.

CONCLUSIONS OF LAW

Based upon the above findings of fact, the court reaches the following conclusions of law:

1. The plaintiff has failed to establish a prima facie case that he was denied a position for which he was qualified because of discrimination based upon his national origin. The United States Supreme Court in its decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973),

and Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), requires that a plaintiff in a Title VII action establish a prima facie case by presenting some evidence to raise an inference that the activity complained of was based upon a protected status. In this case, plaintiff has failed to provide any credible evidence which raises any inference that the selection process by the Small Business Administration for the position of Business Management Officer, GS-1101-13 (ADMA), and the selection from the "Best Qualified List" was based upon plaintiff's status of Italian national origin. The selection process for the position conformed with the law and the rules and regulations and Standard Operating Procedure of the Small Business Administration. Thus, the court sitting as trier of fact has

determined that plaintiff failed to present a prima facie case of discrimination and the defendant is entitled to judgment as to any discrimination claim by reason of national origin in filling the position of the Boise office of Small Business Administration for the position of Business Management Officer, (GS-1101-13(ADD-MA)).

2. With regard to plaintiff's claim of having been terminated as a Business Management Specialist with the rank of GS-12 in retaliation for his complaints of unlawful discrimination or because of unlawful discrimination against him because of his national origin, the plaintiff has presented no credible evidence of any such discrimination against him because of his national origin. The plaintiff violated a direct order of his superior, the District Director of the Boise office, in failing to

to respond to questions of Mr. Terry Crisp, an investigator from the Office of the Inspector General, Security and Investigations Division, and in the plaintiff's failure to comply with Agency SOP 37-35, Item No. 15, and Section 105.516 of the Standards of Conduct Regulations (13 C.F.R. 105.516), and for insubordination and failure to carry out an assigned order of his duly authorized supervisor.

3. Thus, as a matter of law plaintiff has failed to establish a prima facie case on his claim of being denied a position for which he was qualified because of discrimination based upon his national origin. Further, that plaintiff's position with the Small Business Administration as a Business Management Specialist, GS-12, was properly terminated by the duly authorized officers of the Small Business Administration.

B-17

4. IT IS ORDERED AND ADJUDGED that plaintiff's claims be dismissed and judgment is hereby entered in favor of the defendant on all matters set forth in plaintiff's Complaint. Costs to the defendant in the amount of \$ _____.

Dated this 23 day of November,
1982.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES DISTRICT
JUDGE